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MAINE SUPREME JUDICIAL COURT  
DOCKET NO. OJ-12-2

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In the Matter of  
Request for Opinion of the Justices  
in a Communication from  
The House of Representatives  
Dated February 29, 2012

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Brief Amici Curiae of  
Representative Emily Cain, Representative Terry Hayes, Representative Mark Dion,  
Representative Charles Priest, Representative Sharon Treat, Representative John Martin,  
Representative Jon Hinck and Representative Maeghan Maloney

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March 16, 2012

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### **Interest of Amici Curiae**

Amici Curiae Representative Emily Cain, Representative Terry Hayes, Representative Mark Dion, Representative Charles Priest, Representative Sharon Treat, Representative John Martin, Representative Jon Hinck and Representative Maeghan Maloney are members of the Maine House of Representatives in the 125<sup>th</sup> Legislature. In their official role they share responsibility for orderly state budgeting and finances, giving them a strong interest in ensuring that the actions of the Treasurer of State or any constitutional officer comport with all constitutional and statutory requirements and are valid beyond question. Each amicus has sworn an oath to fulfill their duties according to the Constitution and laws of the State. They have served a combined 102 years in the Legislature. Five are also Maine attorneys.

### **Statement of Facts**

Bruce Poliquin was sworn in as Maine's 49<sup>th</sup> Treasurer of State on January 6, 2011. Before assuming office Mr. Poliquin compiled a substantial record as a businessman. Biographical information on the Treasurer of State's web page notes that "Mr. Poliquin has been a private sector business owner and manager during the past 35 years." Me. Treasurer of State web site/about us/biography (visited March 14, 2012). His work has included financial services, pension fund consulting, and investment management. *Id.* Mr. Poliquin was also a candidate for governor in 2010.

As a public official Mr. Poliquin has filed routine annual reports with the Commission on Governmental Ethics and Election Practices providing information about his finances, including items relating to the business activity now at issue. In addition, Attorney General William Schneider recently issued an opinion in response to a legislative inquiry regarding Mr. Poliquin. Op. Me. Att'y Gen. 2012-02.

These and other public documents tell enough about his involvement in a range of activities to demonstrate that Mr. Poliquin is sometimes a passive investor and at other times an active businessman. Mr. Poliquin owns passive investments including two investment management limited partnerships – one based in New York and another based in Delaware. *Comm'n on Gov't Ethics & Elec. Prac., 2012 Mtg. Agendas*, Mtg. of Feb. 29, 2012, Agenda item #2 at 29-33. He is also a limited partner in a real estate limited partnership based in Pennsylvania. *Id.*

Mr. Poliquin's active business ownership includes Dirigo Holdings LLC and the Popham Beach Club, as set forth in more detail below.

Dirigo Holdings LLC. This business entity is a domestic limited liability company organized under the laws of Maine. Op. Me. Att’y Gen. 2012-02 at 2. Mr. Poliquin is the Registered Agent for Dirigo Holdings LLC and is the sole member of the LLC. *Id.* He is vested with exclusive responsibility for the management of the company as a matter of state law. *Id.*

Dirigo Holdings LLC was formed for the purpose of building a 69-unit development known as Popham Woods Condominiums on 183 acres of land in Phippsburg. *Id.* The estimated cost of the project was stated to be \$17,297,000. *Id.* Mr. Poliquin intended to finance it himself. *Id.*

Mr. Poliquin pays the expenses of Dirigo Holdings LLC. *Id.* at 3. The company employs a bookkeeper and manager who periodically consult with Mr. Poliquin about business matters. *Id.* Mr. Poliquin is the sole authorized signatory for the company bank account. *Id.* at 3. The condominiums are currently being marketed for sale to the general public. *Id.* at 2.

Popham Beach Club. This enterprise is also entirely owned and controlled by Mr. Poliquin. Op. Me. Att’y Gen. 2012-02 at 2. The club is a social gathering facility for members of the condominium association and (since 2011) paying members of the public. *Town of Phippsburg, Joint Session of Selectmen and Planning Board, Business Expansion Hearing Minutes* at 5 (Dec. 8, 2011) (hereinafter “*Phipp. Minutes* at \_\_\_”). Its business permit allows 150 people to be present in the club. *Id.* at 4. The Club does not have a liquor license, but catered events may include food and alcoholic beverage service. *Id.* at 7.

The Popham Beach Club is not incorporated; the revenues and expenses of the Club are the personal revenues and expenses of Mr. Poliquin. Op. Me. Att’y Gen. 2012-02 at 2. The Club does not have a separate legal existence and it does not file its own tax returns. *Id.* Although a club manager assists with routine matters, Mr. Poliquin has sole responsibility for managing the finances of the Club. *Id.* Mr. Poliquin is the sole signatory for the Club’s checking account, and the Club’s utility bills are in his name. *Id.* Mr. Poliquin pays the taxes and all invoices from the checking account he established for the Club. *Id.* Mr. Poliquin is involved in “any . . . initiative” relating to the club that goes beyond the ordinary course of daily business. *Id.* (“For any Club initiative, work or invoice not in the ordinary course of business, the bookkeeper or the manager contacts Mr. Poliquin.”)

Mr. Poliquin was granted the original business permit to open the Club in 2006. *Phipp. Minutes* at 1. The permit did not allow for “functions” such as weddings or reunions, and was limited to seasonal use. *Town of Phippsburg, Joint Session of Selectmen and Planning Board, Business Expansion. Hearing Findings of Fact and Conclusions of Law* (Dec. 8, 2011) at 2 (hereinafter “*Phipp. Findings* at \_\_\_”). The 2006 permit only allowed use by condominium residents<sup>4</sup> and their guests, and did not allow

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<sup>4</sup> The condominium development and the associated Club may be considered two facets of a single business enterprise. Mr. Poliquin is the exclusive owner of both the Club and Dirigo Holdings LLC which is developing the Popham Woods Condominiums. Op. Me. Att’y Gen. 2012-02 at 2. The Club is located on land adjacent to the condominiums, and both the club building and the parcel of land where it is situated are owned by Mr. Poliquin. *Id.* Mr. Poliquin uses the same bookkeeper for the Club and the company. *Id.* at 3. Like Dirigo Holdings LLC, the Club employs a manager. *Id.* at 2. Until 2011 the only people allowed to use the Club were residents of Popham Woods Condominiums and their guests. *Phipp. Minutes* at 5. The Club has no separate legal existence. Op. Me. Att’y Gen. 2012-02 at 2.

Mr. Poliquin to rent the facility for use by the general public. *Id.* at 1, 2.

At some point prior to July of 2011 Mr. Poliquin determined to expand the business opportunities of the Club, proposing to conduct new activities which would require an amended business permit. The revised permit would open a variety of new business opportunities for the Club. First, it would allow the addition of year-round functions. *Id.* at 1. Second, it would no longer restrict the Club's use to members of the condominium development or their guests, and thus would potentially access a far larger customer base. *Phipp. Minutes* at 5. Third, under the amended business permit Mr. Poliquin could rent the Club building for a wider range of events "including, but not limited to, corporate meetings, family-church-civic gatherings, and health retreats." *Phipp. Findings* at 1.

Mr. Poliquin began discussing his new plan for the Club with the Phippsburg Planning Board on July 12, 2011 and submitted his formal application for an amended business permit on November 15, 2011. *Id.* at 2. Mr. Poliquin presented the plan at the public hearing on December 8, 2011 where he personally appeared to advocate for the expansion of his business permit and explained in detail the new business he would bring to the Club and what the change would mean to its neighbors. *Phipp. Minutes* at 2-5.

Mr. Poliquin has stated that he considers the Club a "passive investment." *Op. Me. Att'y Gen.* 2012-02 at 2.

As Treasurer of State Mr. Poliquin exercises significant state financial authority, including the responsibility for managing thirty-three separate bank accounts, paying vendors and employees, overseeing investments and trust funds, and issuing bonds.<sup>5</sup>

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<sup>5</sup> The major duties of the Treasurer are set forth at 5 M.R.S. § 121 to § 155.

On February 29, 2012 the Maine House of Representatives approved House Order 0041 referring the following questions to the Supreme Judicial Court:

Question 1. Does mere ownership of business interests or stock by the Treasurer of State constitute engaging in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader as such terms are used in the Constitution of Maine, Article V, Part Third, Section 3?

Question 2. If the answer to Question 1 is in the affirmative, would the Treasurer of State be engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader if the Treasurer of State did not manage or involve himself in the day-to-day activities of such business interests or stock?

Question 3. If it is determined that the Treasurer of State has engaged in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader, does that finding affect or have an impact on the validity of the actions taken by the Treasurer of State in the performance of his official duties as used in the Constitution of Maine, Article V, Part Third, Section 3?

HO 0041 (125<sup>th</sup> Legis. 2012).

### **Issues Presented**

The legislator-amici respectfully present this analysis of issues raised by the first and second propounded questions.

1. Whether the Treasurer of State's activities as developer of Popham Woods Condominiums and the proprietor of the Popham Beach Club constitute "engaging in any business of trade or commerce, or as a broker, or as an agent or factor for any merchant or trader" as such terms are used in the Constitution of the State of Maine? Me. Const. art. V, pt. 3, § 3?
2. Whether propounded Question 2 regarding a Treasurer of State who is not managing any businesses or involving himself in their day-to-day activities is merely hypothetical and therefore not a "solemn occasion"?

### Summary of the Argument

1. The Treasurer of State’s activities as the sole business person behind both the development of Popham Woods Condominiums and the Popham Beach Club constitute “engaging in any business of trade or commerce” within the meaning of the Constitution of Maine, Article V, Part 3, section 3.
2. Since the sitting Treasurer of State is actively involved in the day-to-day activities of his condominium development business and the associated social club, Question 2 propounded by the House of Representatives is a hypothetical question and does not constitute a solemn occasion.

Standard for “Solemn Occasion” The separation of powers doctrine “dictates that [the Court] decline to answer questions presented by the Governor or the Legislature regarding their respective authority.” *Opinion of the Justices*, 815 A.2d 791, 794 (Me. 2002). Article VI, section 3 creates a “narrow exception” only applicable to important “questions of law, and upon solemn occasions.” *Id.* The question presented must be of “live gravity,” referring to the “seriousness of actions that the Legislature or the Governor must take and on which they seek guidance through an advisory opinion.” *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997). Other factors include whether the questions are “of an immediate and serious nature,” *Opinion of the Justices*, 815 A.2d 791, 794 (Me. 2002), and whether “the situation presents an unusual exigency.” *Opinion of the Justices*, 709 A.2d 1183, 1185 (Me. 1997). The restriction is jurisdictional, *Opinion of the Justices*, 437 A.2d 597, 610 (Me. 1981), and where no solemn occasion or question of law exists, no opinion is given.

## Argument

**1. The Treasurer of State's activities as the sole business person behind both the development of Popham Woods Condominiums and the Popham Beach Club constitute "engaging in any business of trade or commerce" within the meaning of the Constitution of Maine, Article V, Part 3, section 3.**

**A. The development and operation of the Popham Woods Condominiums and the Popham Beach Club constitute "business of trade or commerce."**

Mr. Poliquin's actions described above cannot be reconciled with the Constitutional prohibition in Article V, Part 3, section 3. His enterprises are clearly "business" ventures in any ordinary sense of the word. *Webster's* defines "business" as "a usu[ually] commercial or mercantile activity customarily engaged in as a means of livelihood and typically involving some independence of judgment and power of decision . . . and sometimes contrasted with the arts . . . and professions." *Webster's* 302 (3d ed. 1993).

The phrase "trade or commerce" should not be interpreted to exclude Mr. Poliquin's activities. Although "trade or commerce" was once susceptible to a narrow interpretation limited to the movement of physical goods through purchase and sale, that is by no means the only meaning and was not the only meaning in the 1820's. In the first years after ratification of the federal Constitution, considerable debate occurred between those who believed "commerce" referred only to purchase and sale of goods and commodities, and others who thought it embraced any gainful occupation. Just four years after Maine adopted Article V, Part 3, Chief Justice John Marshall wrote for the United States Supreme Court rejecting the view that the word "commerce" in the federal Constitution was limited to the purchase and sale of goods and commodities. *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat) (1824) ("commerce, undoubtedly, is traffic, but it is

something more. It is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . .”) Since then, the “goods and commodities” interpretation of the word “commerce” is rarely seen outside history books, and the broader interpretation of “commerce” has become an unquestioned feature of the legal landscape. If current federal constitutional law is any guide, there is no doubt that Mr. Poliquin’ condominium development and beach club businesses constitute “commerce”. See, e.g., *Heart of Atlanta Motel, Inc.v. United States*, 379 U.S. 241 (1964) (analyzing whether hotel accommodations are interstate in nature while assuming the hotel business to be “commerce”).

We have found no decisions of this Court interpreting Article V, Part 3. A 1923 Opinion of the Attorney general analyzed this provision as follows:

[O]ne holding the office of Treasurer of the State of Maine is prohibited from engaging during his term of office in any business, and by that is meant any occupation or employment pursued as a calling, not of course including the learned professions, in which a person is engaged for procuring subsistence or for profit.

Op. Me. Att’y Gen. (January 23, 1923), *cited in* Op. Me. Att’y Gen. 2012-02 at 3.

Similarly, a 1929 Opinion of the United States Attorney General drew a distinction between passive participation in business as a stock owner, and active management and involvement in business affairs. See *Id.* Critical to both opinions is the degree of time and attention required of the public official. According to the analysis of then Deputy Attorney General Donald G. Alexander in an Opinion issued in 1978, the chief justification for prohibiting the Treasurer of State from engaging in business is to ensure that no other obligations “divert his attention from a full-time commitment to his job as Treasurer” so that he may give his “full fidelity to the position.” 1978 Me. AG LEXIS

329, \*2; Op. Me. Att’y Gen. (December 1, 1978), *cited in* Op. Me. Att’y Gen. 2012-02.

This clear distinction between passive and active business interests is true to the original meaning, provides a bright line test, and is buttressed by common sense.<sup>7</sup>

Not surprisingly, Mr. Poliquin’s enterprises are also referred to as “businesses” not only in the text of the propounded questions, but in numerous public documents and the media. *See, e.g., Phipp. Findings* at 1 (“an application for the expansion of the business known as Popham Beach Club”). Mr. Poliquin’s enterprises are clearly “business of trade or commerce.”

**B. Mr. Poliquin is “engaged” in the business of the Popham Woods Condominiums and the Popham Beach Club.**

The second part of the analysis asks whether Mr. Poliquin is actively “engaged” in those businesses, and the answer is clearly affirmative.

Real estate will not develop itself. In the business of real estate development, there must be a developer, and in the case of Popham Woods Condominiums and the associated Popham Beach Club it is Mr. Poliquin and Mr. Poliquin alone who actively plays that role. Likewise, a social club cannot expand from a seasonal enterprise to a year-round concern without someone to champion that effort. Again, Mr. Poliquin actively played that role, conceiving of the expansion, applying for a business permit amendment, and actively shepherding the application through to approval. Throughout this time he has remained involved in all but the routine decisions of the businesses. Op. Me. Att’y Gen. 2012-02 at 2. It appears that no other person wielded authority or even

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<sup>7</sup> This interpretation comports with the likely intent of the drafters of Article V, Part 3, as it seems improbable that they would have been greatly concerned about a Treasurer of State’s involvement in the purchase or sale of groceries (for example) yet indifferent to his involvement in private banking or finance.

had significant involvement in developing the business. With respect to the condominiums and the Club Mr. Poliquin was actively engaged and not a passive investor.

To confirm this conclusion one need only ask what would be different had Mr. Poliquin separated himself from the affairs of the Popham Woods Condominium development and the Popham Beach Club when he took office in January of 2011.<sup>8</sup> Without his active leadership, planning and advocacy his business plan for the Club – a key means of attracting purchasers for the condominium complex – would have screeched to a halt. Certainly the proposed expansion from a seasonal enterprise for condominium owners to a year-round social club for paying customers would not have occurred. No bills would have been paid since he alone controls the accounts. No other person had authority to make business decisions for the company or the Club. Only caretaking staff would remain. Simply put, the business would no longer be what it is today – a real estate development business and a social club reaching out to a broad new potential customer base. While it is not clear that the condominium development and Club would have collapsed, it is clear that neither could continue on its current trajectory without the active involvement of the one person who has owned and directed the enterprise from its inception to the present day. Clearly Mr. Poliquin has been actively engaged in the business.<sup>9</sup>

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<sup>8</sup> Mr. Poliquin had been Treasurer of State for seven months of his two-year term when he approached the Town of Phippsburg about expanding the Popham Beach Club.

<sup>9</sup> As noted by the Attorney General in his recent Opinion, Mr. Poliquin's continued involvement with his businesses contrasts with the decisions of Andrew Mellon, appointed United States Secretary of the Treasury in 1929, who at that time ceased to be

The Attorney General has reached the same conclusion, advising Mr. Poliquin on February 10, 2012 that he should no longer actively manage these businesses while serving as Treasurer of State:

[A]ny activities related to the active management of stock or other ownership interests should be handled by third persons . . . . [Mr. Poliquin] should take steps to disassociate himself from the active management of any of the entities in which he is invested and any entities in which he is the sole owner or principal or agent. Furthermore, he should not appear before any governmental bodies on behalf of entities that he owns.

Op. Me. Att’y Gen. 2012-02 at 5 (emphasis added).

Finally, the conclusion that Mr. Poliquin is actively engaged in business affairs is implicit in the propounded questions themselves. The first propounded question refers to “mere ownership of business interests . . . .” Whether the House of Representatives intended “mere ownership” to include only passive ownership is answered by the second propounded question, which plainly is limited to passive ownership (asking the Court to assume that “the Treasurer of State did not manage or involve himself in the day-to-day activities of such business interests or stock.”) The only discernible difference between the two questions is that Question 2 explicitly assumes that the Treasurer is not actively involved in his businesses. Therefore Question 1 should be read to assume that the Treasurer of State is actively involved in his businesses. Any other reading yields redundancy in the questions.

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an officer or director of his companies. Op. Me. Att’y Gen. 2012-02 at 1. Although he did not divest his stock ownership, Mellon refrained from “giv[ing] his time or attention to the active conduct of any incorporated business.” *Id.* at 1-2. The federal prohibition on the Secretary of the Treasury’s business activities in effect in 1929 was “very similar” to that in Article V, Part 3. *Id.*

**2. Since the sitting Treasurer of State is actively involved in the day-to-day activities of his condominium development business and the associated social club, Question 2 propounded by the House of Representatives is a hypothetical question and does not constitute a solemn occasion.**

Question 2 asks the Court to assume that the “Treasurer of State did not manage or involve himself in the day-to-day activities” of his businesses. As set forth in detail above, that assumption is counterfactual with respect to the sitting Treasurer of State. He is clearly involved in the management, leadership, planning and direction of both the Popham Woods Condominium and the Popham Beach Club.

At some future date the Treasurer of State may separate himself from the day-to-day activities of his businesses, or a future Treasurer of State may present a question of passive business ownership. But that is not the case today. Therefore this question does not present a “concrete, certain, or immediate legal problem.” *Wagner v. Secretary of State*, 663 A.2d 564, 567 (1995). Taken in context, Question 2 is “tentative, hypothetical and abstract,” *Opinion of the Justices*, 623 A.2d 1258, 1261 (Me. 1993), and therefore not a current controversy of “live gravity.” 709 A.2d at 1185. Question 2 represents precisely the kind of advisory request based on a hypothetical situation that the Court has rejected in the past. There is no reason for a different result here.

## Conclusion

For the reasons set forth above, Amici Curiae respectfully request that this Court:

1. Find that during his tenure in office the Treasurer of State has engaged in “any business of trade or commerce” as such terms are used in the Constitution of Maine, Article V, Part 3, section 3; and
2. Find that Question 2 Propounded by the House of Representatives does not present a solemn occasion.

Dated: March 16, 2012

A handwritten signature in black ink that reads "John Brautigam". The signature is written in a cursive, flowing style.

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## CERTIFICATE OF SERVICE

I certify that on March 16, 2012 I caused two copies of the forgoing Brief of Amici Curiae to be served on the following by pre-paid first class mail at the following addresses:

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